



**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner-Appellant,

v.

HAROLD W. DORAN,

Respondent-Appellee.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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**AMERICAN BRIEF
GRAND**

JAMES R. NEUHARD

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**COUNTERSTATEMENT OF THE QUESTION
PRESENTED**

THE MICHIGAN SUPREME COURT DID NOT MIS-
CONSTRUE THE FOURTH AMENDMENT, THE EX-
TRADITION CLAUSE OF THE UNITED STATES
CONSTITUTION OR THE PROVISIONS OF THE UNI-
FORM CRIMINAL EXTRADITION ACT WHEN IT
HELD THAT THE SCOPE OF A HABEAS CORPUS
CHALLENGE TO EXTRADITION LEGITIMATELY
ENCOMPASSES A SCRUTINY BY THE ASYLUM JUR-
ISDICTION OF THE CHARGING DOCUMENTS SUP-
PORTING THE DEMANDING STATE'S REQUISITION
TO DETERMINE WHETHER SUCH DOCUMENTS
FACIALLY REFLECT PROBABLE CAUSE AND
HENCE "SUBSTANTIALLY CHARGE" THE AC-
CUSED FUGITIVE WITH CRIME.

COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, with the following additions:

1. The Michigan Supreme Court ordered the immediate release of Respondent Harold Doran largely because he had been incarcerated without bond pending extradition since December 18, 1975. *People v Doran*, 401 Mich 235, 250, fn 5, 258 NW 2d 406 (1977). By the decisional date of *Doran* (October 4, 1977) Respondent, who was being held solely for extradition, had been in custody almost two years. The Arizona charge upon which extradition was sought carries a maximum of five years imprisonment. ARS 13.1645.

2. The Petition for Certiorari was received by Counsel for Respondent on February 23, 1978.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. The Decision Below Rests Upon An Adequate And Independent State Ground And Therefore This Court Should Decline Jurisdiction.

The Michigan extradition statute, based on the Uniform Criminal Extradition Act, provides, as a prerequisite to rendition, for the furnishing of "certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, and the warrant issued thereupon, stating the offense with which the accused is charged." The statute further provides that the "indictment, information or affidavit made before the magistrate must *substantially charge* the person demanded with having committed a crime under the law of that state." MCLA 780.3; MSA 28.1285(3). Emphasis supplied.

In *In the Matter of Doran (People v Doran)*, 401 Mich 235, 258 NW 2d 406 (1977), the Michigan Supreme Court held that "Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment, a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause." *People v Doran, supra*, 250.

In so holding, the Michigan Supreme Court was expressly construing the Uniform Act's requirement that the indictment, affidavit or information "substantially charge" the accused fugitive with crime. In effect, the state court was interpreting the "substantially charge" requirement in a manner consistent with the Fourth Amendment to the United States Constitution.

The Uniform Criminal Extradition Act, as enacted in Michigan by MCLA 780.1-780.31; MSA 28.1285(1)-(31), is clearly state legislation. The state court's holding did not

rely entirely on the Fourth Amendment but merely specified the Fourth Amendment implications of the state law's "substantially charge" requirement.

Thus, this Court must consider the applicability of

" 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v Muller*, 296 US 207, 210, 80 L Ed 158, 159, 56 S Ct 183.' "

Cramp v Board of Public Instruction, 368 U.S. 278, 82 S Ct 275, 7 L Ed 2d 285, 288 (1961).

If the state court's ruling is based solely upon Federal grounds or the state court is acting under what it conceives to be the compulsion of the Federal constitution, a separate state ground has not been established. *Department of Mental Hygiene of California v Kirchner*, 380 U.S. 194, 85 S Ct 871, 13 L Ed 2d 753, 756-758 (1965). Here, the Michigan Supreme Court relied on a number of Federal decisions, notably *Kirkland v Preston*, 128 U.S. App D.C. 148; 385 F 2d 670 (1967). However, the Supreme Court referred to such cases by analogy only, comparing the Federal Court's interpretation of the Fourth Amendment to its own similar interpretation of MCLA 780.3; MSA 28.1285(3). *People v Doran, supra*, 401 Mich at 244-247.

The *Doran* opinion also cited a number of state appellate decisions supporting the proposition that an adequate showing of probable cause must precede rendition.

This was not a case where the State and Federal grounds are "so interwoven" that this Court would be unable to conclude that the judgment rests upon an independent interpretation of the state law. *Jankovich v Indiana Toll Road Commission*, 379 U.S. 487, 85 S Ct 493, 13 L Ed 2d 439, 443 (1965). Rather, the Michigan Supreme Court was merely

exercising its prerogative as "the final judicial arbiter of the meaning of state statutes" and construing a provision of the Uniform Criminal Extradition Act as enacted in Michigan. See *Gurley v Rhoden*, 421 U.S. 200, 207, 95 S Ct 1605, 44 L Ed 2d 110, 117 (1975). In reaching the result in *Doran*, the Michigan Supreme Court was fulfilling what it has historically viewed as its duty to interpret Michigan statutes in such a way as to render them constitutional. See *People v Adams*, 389 Mich 222, 229-230; 205 NW 2d 415 (1973); *Michigan Towing Association, Inc. v Detroit*, 370 Mich 440, 456; 122 NW 2d 709 (1963).

Thus, Respondent urges that the Michigan Attorney General has failed to meet his burden of demonstrating that the decision in *Doran* is not supported by an adequate, independent state ground.

II. The Michigan Supreme Court, In Deciding A Habeas Corpus Challenge To Extradition, Has A Right To Address Itself To The Question Of Whether The Charging Documents Underlying The Demanding State's Requisition Reflect Sufficient Probable Cause To Justify Rendition Of An Accused Fugitive By Michigan.

The asylum state, and the courts of that state, have the right to protect state citizens and other inhabitants from unreasonable intrusions into their persons or property and from significant unjustified restraint of liberty. Such intrusion, or restraint, must be preceded by a sufficiently detailed demonstration of probable cause to believe that a crime has been committed. This is the mandate of the Fourth Amendment. *Gerstein v Pugh*, 420 U.S. 103, 95 S Ct 854, 43 L Ed 2d 54 (1975).

Counterbalanced against the demands of personal liberty is the interest of the several states in an efficient and speedy extradition process whose effect is to eliminate state borders to prevent exploitation of such boundaries as "a shield

for the guilty". *Biddinger v Commissioner*, 254 U.S. 128, 132-133, 38 S Ct 41, 62 L Ed 193 (1917). This interest is protected by the Extradition Clause, U.S. Const. Art IV, §2, implemented by 18 USC 3182 and state legislation on extradition. The demands of the Extradition Clause are not necessarily irreconcilable with those of the Fourth Amendment, and, contrary to Petitioner's assertion, the Michigan Supreme Court's application of the Fourth Amendment in *Doran* does not clash with the purpose of the Extradition Clause.

¶ The Extradition Clause, speaking of potential extraditees, refers to "A person *charged* in any State . . . with . . . felony, or other Crime," U.S. Const, Art IV, §2. (Emphasis supplied). 18 USC 3182 provides that to invoke rendition the demanding state must tender to the asylum state "a copy of an indictment found or an affidavit made before a magistrate . . . *charging* the person demanded with . . . crime . . ." (Emphasis supplied). Similarly, MCLA 780.3; MSA 28.1285(3) based on the Uniform Criminal Extradition Act, provides that the "indictment, information or affidavit" tendered by the demanding state "must substantially charge the person demanded with . . . crime."

This Court has repeatedly held that whether charging documents in support of an extradition request "substantially charge" a crime is proper subject of inquiry in a habeas corpus challenge to extradition. *Ex parte Reggel*, 114 U.S. 642, 5 S Ct 1148, 29 L Ed 250 (1885); *Roberts v Reilly*, 116 U.S. 80, 6 S Ct 291, 29 L Ed 544 (1885); *Pierce v Creecy*, 210 U.S. 387, 28 S Ct 714, 52 L Ed 1113 (1908). However, this inquiry, in order to avoid undue circumstances on the extradition process, has historically been limited to the *face* of the charging documents. *Biddinger v Commissioner, supra*; *Roberts v Reilly, supra*.

Petitioner intimates that the *Doran* result entails and condones an inquiry "behind the demanding state's docu-

ments in order to consider Federal constitutional claims raised by the fugitive." *Petition for Certiorari*, page 5. This is a misreading of the *Doran* decision.

The Michigan Supreme Court based its holding squarely on *Kirkland v Preston*, 128 U.S. App DC 148, 385 F 2d 670 (1967); where the United States Court of Appeals for the District of Columbia held that a governor's requisition must be supported by a showing of probable cause. Absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the demanding state's requisition should contain more than bald, conclusory accusations.

Following *Kirkland's* analysis of similar language in 18 USC 3182, the Michigan Supreme Court found that to require extradition charging documents to reflect probable cause was

" . . . consistent with the Uniform Act's requirement that the indictment, information or affidavit 'substantially charge' the person demanded with having committed a crime under the laws of the demanding State." *Doran, supra*, 401 Mich at 245.

Contrary to the Attorney General's position, such a result does not subvert the policy underlying cases such as *Pierce v Creecy, supra*, namely to ensure that a habeas court does not provide a fugitive charged with crime with asylum by characterizing that charge as insubstantial because of mere technical deficiencies. Rather, the *Kirkland* and *Doran* decisions seek to probe the meaning of "substantiality".

Absent an evidentiary determination preceding or immediately following a serious restraint of liberty or other intrusion, the Fourth Amendment has consistently been interpreted to require, as a prerequisite to such intrusion, supporting documents which reflect on their face a detailed factual showing of probable cause. *Gerstein v Pugh*,

supra; *Whitely v Warden*, 401 U.S. 560, 91 S Ct 1031, 28 L Ed 2d 306 (1971); *Giordenello v United States*, 357 U.S. 480, 78 S Ct 1245, 2 L Ed 2d 1503 (1958); *Spinelli v United States*, 393 U.S. 410, 89 S Ct 584, 21 L Ed 2d 637 (1969); *Aguilar v Texas*, 378 U.S. 108, 84 S Ct 1509, 12 L Ed 2d 723 (1964). The requisite showing entails setting forth "some of the underlying circumstances surrounding the crime charged, as well as an adequate identification of the source or sources of the information set forth in the affidavit." *Pippin v Leach*, 188 Colo 385, 534 P 2d 1193 (1975).

Noting the extremely serious restraint posed by an extradition arrest,¹ the Michigan Supreme Court did nothing more revolutionary than require that where an extradition request is supported by affidavits alone, those affidavits must facially reflect probable cause. In so holding, the Supreme Court distinguished the *Doran* case from a situation where the requisition is supported by an indictment, which subsumes a prior evidentiary determination of probable cause. *Doran, supra*, 401 Mich 249. The Supreme Court also considered the fact that in Michigan conventional arrest warrants are often issued without a detailed factual showing of probable cause, contemplating a prompt prelimi-

¹ The *Doran* decision, 401 Mich at 246 quotes the following passage from *Kirkland*:

"The law appreciates the hardship which extradition can involve: not only the suspension of one's liberty but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition. It is consistent with this concern for the accused's just treatment to recognize his right to require official confirmation of probable cause in the asylum state before extradition."

nary hearing on this issue following arrest. The Court speculated that there was no reason to assume that Arizona did not follow a similar procedure.² *Doran, supra*, 401 Mich at 249.

In holding that absent some indication of a prior judicial determination, affidavits supporting a requisition had to reflect, on their face, factual information constituting probable cause, the Supreme Court carefully avoided extending the habeas corpus inquiry beyond the face of the charging documents:

"It is not suggested that the Michigan courts inquire into the underlying facts. It is determined rather that Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause." *People v Doran, supra*, 401 Mich 250.

Such a proposal would not unduly burden the extradition process:

"... documenting probable cause on the face of an affidavit requires no more than what policemen do on a daily basis to secure arrest or search warrants. This minor imposition is necessary to protect against the very serious consequences of a wrongful extradition." *Wellington v State of South Dakota*, 413 F Supp 151, 154 (SD, 1976). See also *Kirkland v Preston, supra*, 385 F 2d 676-677.

The Attorney General further maintains that "The record in the proceeding below indicates that a magistrate in

² In fact, in Arizona an arrest warrant may issue upon less than probable cause. See *State v Lynch*, 107 Ariz 463, 489 P 2d 697 (1971).

the demanding state, Arizona, had determined that under the laws of the State of Arizona there was reasonable cause to believe that respondent committed a crime." *Petition for Certiorari*, page 6. There is simply no basis for this conclusion. Like the charging documents condemned in *Kirkland*, the Arizona complaint and warrant are both phrased in conclusory language which simply mirrors the language of the pertinent provisions of the Arizona criminal code. These documents do not indicate that a judicial determination of probable cause took place. The only "record" of a purported probable cause determination is the strictly "canned" language of the arrest warrant;

"I have found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate."

underneath which a Justice of the Peace has affixed her signature. This indicates no more than that a Justice of the Peace signed the warrant, which is merely a standardized, fill-in-the-blanks form. No additional circumstances or sources are supplied to flesh out this conclusory finding of "reasonable cause". The State of Michigan is not obligated to extradite on the basis of boilerplate, and the Supreme Court of Michigan was correct in so holding.

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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